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7 BEFORE THE INSURANCE COMMISSIONER
8 OF THE STATE OF WASHINGTON

9 In the Matter of the Application
10 regarding the Conversion and
11 Acquisition of Control of Premera Blue
12 Cross and its Affiliates.

No. G 02-45

PREMERA'S RESPONSE TO THE
OIC STAFF'S PREHEARING
MEMORANDA

13 On April 23, 2004, the OIC Staff submitted a prehearing memorandum regarding
14 the standards for the admission and exclusion of evidence in adjudicative proceedings
15 ("Evidence Memo"), as well as a prehearing memorandum regarding hearing issues
16 ("Issues Memo"). PREMERA and Premera Blue Cross (collectively, "Premera") offer the
17 following response to the Evidence Memo and the Issues Memo.

18 **I. The Evidence Memo Submitted by the OIC Staff Sets Forth the General**
19 **Standards for Admission and Exclusion of Evidence in this Proceeding.**

20 In the Evidence Memo, the OIC Staff describes the standards for admissibility and
21 exclusion of evidence provided by the Administrative Procedure Act, RCW 34.05.452(1).
22 Premera agrees that RCW 34.05.452 sets forth the rules of evidence for this proceeding.
23 See WAC 10-08-140(1). To avoid any misunderstanding about the import of this statute
24 and the APA more generally, Premera points out the following:
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- RCW 34.05.452(2) provides that the presiding officer “shall refer” to the Washington Rules of Evidence as guidelines for evidentiary rulings, if those rules are consistent with RCW 34.05.452(1).
- Hearsay evidence is not automatically admissible. It must, rather, be “the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs.” RCW 34.05.452(1). A reasonable person’s customary reliance on hearsay will vary depending on the significance, the consequences, and the circumstances of the utterance. *See, e.g., State v. Parris*, 98 Wn.2d 140, 146, 654 P.2d 77 (1982); *Fettig v. Dep’t of Social & Health Servs.*, 49 Wn. App. 466, 474-75, 744 P.2d 349 (1987).
- “Where it bears on the issues presented,” an agency’s experience, technical competency, and specialized knowledge may be used in evaluating evidence.

RCW 34.05.461(5). Where agency expertise does not bear on the issues presented, no such deference is warranted.

II. The Issues Memo Confuses the Criteria for Evaluating Premera’s Proposal.

The Issues Memo submitted by the OIC Staff offers a very brief summary of the procedural history of this proceeding and the proposal that set it in motion.¹ The Issues Memo then sets forth a series of criteria that, it says, govern Premera’s proposal and describes other questions on which the OIC Staff expects Premera to present evidence. Parts III and IV of the Issues Memo reflect fundamental legal errors that have the unfortunate potential to lead the reader astray.

¹ Premera’s Form A Statement is complex, and the OIC Staff’s summary of the transactions it describes is not fully accurate. For example, the Issues Memo calls the creation of two foundation shareholders “the final step in the proposed transaction” (p. 2); actually, formation of the foundations is the first step. Rather than addressing all such points here, Premera refers the reader to the Form A Statement and its exhibits, including the Plan of Conversion (Ex. A-4 to the Form A).

1 **A. Different Statutes Apply to Form A and Form D Transactions.**

2 The OIC Staff asserts that RCW 48.31B.030 and RCW 48.31C.050 govern
3 Premera's proposal, "since at least one domestic insurer and several domestic health
4 carriers are parties to the transaction." Issues Memo, at 3. The OIC Staff's assertion does
5 not follow from its premises. LifeWise Assurance Company and LifeWise Health Plan of
6 Arizona, Inc. are domestic insurers, which means that they are governed by the Insurer
7 Holding Company Act, ch. 48.31B RCW (the "IHCA"). Premera and its remaining
8 domestic, licensed affiliates are health carriers governed by ch. 48.31C RCW, the Holding
9 Company Act for Health Care Service Contractors and Health Maintenance Organizations
10 (the "HCA"). But Premera and its affiliates are subject to the Form D sections of those
11 statutes (RCW 48.31B.030 and RCW 48.31C.050, respectively) only insofar as they
12 propose to enter into inter-company transactions (e.g., a tax-sharing arrangement).

13 Premera's proposed reorganization from non-profit to for-profit status, like the
14 proposed distribution of shares by the new for-profit company, is a Form A transaction.
15 This has never been in dispute. Form D standards do not apply to an acquisition of
16 control—that is, to a Form A transaction. Form A transactions are, rather, subject to
17 RCW 48.31B.015 and RCW 48.31C.030.² The "fair and reasonable" standard found in
18 RCW 48.31C.050(1) and cited by the OIC Staff has no application whatever to Form A
19 transactions.

20 The Legislature's omission of the "fair and reasonable" standard for judging a
21 Form A transaction must be taken to be deliberate, since the Legislature clearly knew how

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23 ² See RCW 48.31B.030(1)(d) ("The commissioner, in reviewing transactions under (b) of
24 this subsection, shall consider whether the transactions comply with the standards set forth
25 in (a) of this subsection and whether they may adversely affect the interests of
26 policyholders."); RCW 48.31C.050(4) ("The commissioner, in reviewing transactions
27 under subsection (2) of this section, shall consider whether the transactions comply with
28 the standards set forth in subsection (1) of this section."). HCA transactions subject to
29 review under Form D standards specifically exclude those "which are subject to approval
30 by the commissioner elsewhere within this title," such as an acquisition that is governed
31 by Form A. RCW 48.31C.050(2).

1 to draft such a test and to impose it where appropriate. *See State v. Moses*, 145 Wn.2d
2 370, 374, 37 P.3d 1216, 1218 (2002) (“Where the Legislature omits language from a
3 statute, intentionally or inadvertently, this court will not read into the statute the language
4 that it believes was omitted.”). In the case of Form A transactions, the Legislature
5 eschewed Form D tests. Instead, it directed that the Commissioner “shall approve” an
6 acquisition of control unless, after a public hearing, he makes one of the findings
7 enumerated in RCW 48.31B.015(4)(a) or RCW 48.31C.030(5)(a). As explained in
8 Premera’s Hearing Brief, there is no basis for the Commissioner to make such a finding
9 here.

10 **B. Because There is No Evidence of Competitive Injury, There is No Need**
11 **to Examine Potential Benefits That Would Compensate for Such**
12 **Injury.**

The parties agree that Premera’s conversion will not have an anticompetitive
13 effect. *See* Premera’s Hearing Brief, pp. 33-35. The factors identified in paragraphs (3)
14 and (4) on page 4 of the Issues Memo—economies of scale or of resource use; greater
15 availability of health care coverage—do not come into play unless the Commissioner
16 would otherwise disapprove an acquisition because of its harm to competition. RCW
17 48.31C.030(5)(a)(ii)(B)(I), (II).³ Because there is no basis to find competitive injury here,
18 those factors are not a part of the hearing.⁴

19 **C. The Issues Memo Does Not Provide a Legal Justification for**
20 **Examination of Other Issues That It Identifies.**

In addition to setting forth Form D and Form A factors, the Issues Memo states
21 that the OIC Staff expects Premera to focus on other questions, including “fair market
22 value” and non-equity based executive compensation. The latter two questions are
23 discussed in Premera’s Hearing Brief at 50-58 and 62-63. As Premera points out, neither
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25 ³ *Accord* RCW 48.31B.015(4)(a)(ii)(B), RCW 48.31B.020(4)(c).

⁴ As pointed out in Premera’s Hearing Brief (at 31 and 35 and in Appendix A), the HCA
also makes the factors listed in paragraphs (5) – (8) on pages of 4-5 of the Issues Memo
subparts of the antitrust inquiry set forth in RCW 48.31C.050(5)(a)(ii).

1 relates to the standards in the HCA. The questions that will properly occupy attention at
2 the hearing are those set forth as criteria for the Commissioner's decision under the HCA
3 and, secondarily, the IHCA. Those criteria are discussed thoroughly in Premera's Hearing
4 Brief at 30-48.⁵

5 DATED this 29th day of April, 2004.

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19 ⁵ The Issues Memo states that the OIC Staff will also present evidence relating to a fair
20 allocation between the Washington and Alaska foundation shareholders. Allocation is a
21 separate question from the merits of Premera's conversion application (*see* OIC Staff's
22 Response to the Alaska Intervenor's Motion to Exclude The Blackstone Group's and
PricewaterhouseCoopers' Final Allocation Reports), resolution of which should not delay
or otherwise impact a decision on Premera's application. *See* Premera's Hearing Brief,
pp. 49-50.

23 The Issues Memo concludes by noting (at 6) that Mr. Odiorne will present the OIC
24 Staff's recommendation regarding Premera's proposal "[a]t the end of the presentation of
25 evidence in this proceeding." The Commissioner's First Order: Case Management Order
provides (at 2-3) that the recommendations of the OIC Staff will be presented "during the
proceedings." Premera objects to the OIC Staff offering its recommendation after the
close of evidence if and to the extent that the recommendation introduces or emphasizes
topics that the parties could have dealt with earlier in the hearing, had they known that
such topics were of particular concern to the OIC Staff.